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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 ELAINE FOSMIRE,

11 Plaintiff,

12 v.

13 PROGRESSIVE MAX INSURANCE  
14 COMPANY, et al.,

15 Defendants.

CASE NO. C10-5291JLR

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION TO  
DISMISS

16 This matter comes before the court on Defendants' motion to dismiss (Dkt. # 34).  
17 Having considered the motion, as well as all submissions filed in support and opposition,  
18 and deeming oral argument unnecessary, the court GRANTS in part and DENIES in part  
19 the motion to dismiss (Dkt. # 34).

20 **I. BACKGROUND**

21 Plaintiff Elaine Fosmire, on behalf of herself and as a proposed class  
22 representative, brings suit against Defendants Progressive Max Insurance Company

1 (“Progressive Max”), Progressive Casualty Insurance Company (“Progressive Casualty”),  
2 Progressive Direct Insurance Company (“Progressive Direct”), and Progressive  
3 Corporation. (Compl. (Dkt. # 1) at 1.) Ms. Fosmire seeks specific performance or  
4 damages, as well as declaratory and injunctive relief, in connection with underinsured  
5 and/or uninsured motorist (“UIM”) coverage contained in automobile insurance policies  
6 sold by Defendants.<sup>1</sup> (*Id.* ¶¶ 1.1-1.2.) At the core of her complaint, Ms. Fosmire alleges  
7 that Defendants failed to compensate her and other similarly-situated policyholders for  
8 diminished value loss under the UIM coverage of Progressive policies. (*Id.* ¶¶ 1.3-1.5.)

9 On June 5, 2007, Ms. Fosmire’s 2007 Mazda was damaged in a collision with an  
10 uninsured motorist. (*Id.* ¶ 4.1.) Ms. Fosmire was insured by Progressive Max, and her  
11 insurance policy included UIM coverage for physical damage. (*Id.* ¶ 4.2; *see* Glade Decl.  
12 (Dkt. # 35) ¶¶ 2-3 & Exs. A-B.) Progressive Max paid for repairs to Ms. Fosmire’s  
13 vehicle. (Compl. ¶ 4.4.) After the repairs were completed, Ms. Fosmire had her vehicle  
14 inspected for diminished value loss and made a demand for diminished value loss, but  
15 was advised that diminished value loss was not covered under her policy. (*Id.*)

16 By this lawsuit, Ms. Fosmire seeks to recover for diminished value loss to her  
17 vehicle. She alleges that Defendants have not fully inspected her vehicle for diminished  
18 value loss, have not fully compensated her for diminished value loss, and have not  
19 informed her about diminished value loss and her right to recover it. (*Id.*) Ms. Fosmire

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21 <sup>1</sup> In her complaint, Ms. Fosmire refers collectively all Defendants in this action as  
22 “PROGRESSIVE” or “Defendants,” without specifying the actions of individual Defendants.  
(Compl. at 1.)

1 asserts claims for breach of contract (Count I), declaratory relief (Count II), and  
 2 injunctive relief (Count III). (*Id.* ¶¶ 7.1-7.26.)

## 3 **II. ANALYSIS**

### 4 **A. Motion to Dismiss Breach of Contract Claims**

5 In Count I of her complaint, Ms. Fosmire brings a cause of action for breach of  
 6 contract. (Compl. ¶¶ 7.1-7.7.) She asserts that Defendants breached the terms of the  
 7 UIM coverage contained in Progressive insurance policies by not advising policyholders  
 8 of their right to recover for diminished value loss and by not compensating policyholder  
 9 for diminished value loss. (*Id.* ¶¶ 7.5.) Additionally, as part of the same cause of action,  
 10 Ms. Fosmire asserts that Defendants mischaracterized coverage by improperly paying  
 11 UIM claims under collision or comprehensive coverage. (*Id.* ¶ 7.6.)

12 Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendants move to dismiss  
 13 Ms. Fosmire's claims against Progressive Casualty, Progressive Direct, and Progressive  
 14 Corporation on the theory that Ms. Fosmire does not have standing to sue these entities.  
 15 (Mot. at 9-17.) Defendants also move to dismiss Ms. Fosmire's mischaracterization  
 16 claims, arguing that she does not have standing to assert these claims on behalf of  
 17 unnamed members of the proposed class because Defendants did not mischaracterize Ms.  
 18 Fosmire's own claim. (*Id.* at 15-17.)

#### 19 1. Rule 12(b)(1) Legal Standard

20 Rule 12(b)(1) permits the court to dismiss a claim for lack of subject matter  
 21 jurisdiction based on standing. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136,  
 22 1140 (9th Cir. 2003). A jurisdictional challenge under this provision may be made on the

face of the pleadings or by presenting extrinsic evidence. *Id.* at 1139. When resolving jurisdiction depends on the merits of a case, the court may not resolve genuinely disputed facts. *Id.* Instead, the court must assume the truth of the allegations in a complaint unless controverted by undisputed facts in the record. *Id.* At this stage of pleading, the non-moving party need only show that the facts alleged, if proved, would confer standing. *Id.* at 1140 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998)).

## 2. Article III Standing

Article III of the United States Constitution limits the jurisdiction of the federal courts to actual cases and controversies. *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990). This requires the person invoking the jurisdiction of the court to establish the requisite standing to sue. As a general matter, to demonstrate standing under Article III, a plaintiff must show that (1) she suffered an injury in fact; (2) the injury is fairly traceable to the defendant's conduct; and (3) it is likely that the injury will be redressed by a favorable decision of the court. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178, 1183 (9th Cir. 2010). Even in a class action, "constitutional standing requirements [must be] satisfied before proceeding to the merits." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc). "It is well settled that '[a]t least one named plaintiff must satisfy the actual injury component of standing in order to seek relief on behalf of himself or the class.'" *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1000 n.7 (9th Cir. 2006).

1        3. Progressive Casualty, Progressive Direct, and Progressive Corporation

2        Defendants argue that the court, in accordance with the reasoning of *Hovenkotter*  
 3 *v. Safeco Corp.*, No. C09-218JLR, 2009 WL 6698629 (W.D. Wash. Aug. 3, 2009), and  
 4 *Shin v. Esurance Ins. Co.*, No. C08-5626RBL, 2009 WL 688586 (W.D. Wash. Mar. 13,  
 5 2009), should dismiss Ms. Fosmire's breach of contract claims against Progressive  
 6 Casualty, Progressive Corporation, and Progressive Direct because Ms. Fosmire  
 7 contracted for insurance with Progressive Max alone. (Mot. at 10-13.) Ms. Fosmire  
 8 concedes that she "is in strict privity of contract only with Progressive Max." (Resp.  
 9 (Dkt. # 38) at 5.) Nevertheless, Ms. Fosmire contends that she has sufficiently alleged  
 10 injuries traceable to all Defendants so as to confer standing, asserting that her injury was  
 11 caused by Defendants as inter-related entities acting to promote their common unity of  
 12 interest. (*Id.* (citing *Martin v. Twin City Fire Ins. Co.*, No. C08-5651RJB, 2009 WL  
 13 902072 (W.D. Wash. Mar. 31, 2009).)

14        Here, Ms. Fosmire must allege facts sufficient to support a finding that she has  
 15 suffered an injury in fact that is fairly traceable to the conduct of Progressive Casualty,  
 16 Progressive Corporation, and Progressive Direct. *Lujan*, 504 U.S. at 560. Having  
 17 reviewed the complaint, as well as the materials submitted by the parties, and assuming  
 18 the truth of the allegations in the complaint, except where contradicted by undisputed  
 19 facts, the court finds Ms. Fosmire has not made a sufficient showing to demonstrate  
 20 standing as to Progressive Casualty, Progressive Corporation, and Progressive Direct. It  
 21 is undisputed that Ms. Fosmire is not in contractual privity with Progressive Casualty,  
 22 Progressive Corporation, or Progressive Direct. Progressive Max is clearly identified as

1 the underwriter of Ms. Fosmire's policy and is the entity with whom Ms. Fosmire  
2 contracted. (Glade Decl. Ex. B at 2.) Ms. Fosmire's arguments to overcome these  
3 undisputed facts do not demonstrate that the actions of Progressive Casualty, Progressive  
4 Corporation, and Progressive Direct injured her in a personal or individualized way.  
5 First, Ms. Fosmire's allegation that Progressive Casualty "processes, adjusts and sets the  
6 claims adjusting policies for payment of diminished value on UIM claims for all the  
7 Progressive family of companies, including [Progressive Max]" (Compl. ¶ 1.8) is  
8 insufficient to confer standing on Ms. Fosmire based on her claims for breach of the  
9 insurance policy she entered into with Progressive Max. *See Hovenkotter*, 2009 WL  
10 6698629, \*3-4; *cf. Shin*, 2009 WL 688586, at \*5. Second, even accepting that  
11 Progressive Direct drafted Ms. Fosmire's insurance policy, the policy is with Progressive  
12 Max, not Progressive Direct. Likewise, the denial of coverage letters identify  
13 Progressive Max as the underwriter, and Ms. Fosmire does not explain how Progressive  
14 letterhead is sufficient to confer standing where there is no question that her policy is  
15 with Progressive Max. Third, even accepting that Defendants share "common leadership,  
16 pooling interests and management," the court does not find this sufficient without more.  
17 The *Shin* court rejected a similar argument, refusing "to embrace the notion that all  
18 related companies may be haled into court for the actions of one . . . of those inter-  
19 related, but distinct, companies merely because they have agreed on common practices."  
20 *Shin*, 2009 WL 688586, at \*5. Therefore, the court grants Defendants' motion to dismiss  
21 Ms. Fosmire's claims against Progressive Casualty, Progressive Corporation, and  
22 Progressive Direct without prejudice.

1       4. Mischaracterization Claims

2       Defendants next move to dismiss Ms. Fosmire's mischaracterization claims under  
3 Rule 12(b)(1). (Mot. at 15-17.) As part of her cause of action for breach of contract, Ms.  
4 Fosmire alleges:

5               PROGRESSIVE also breached the express provisions of its contracts with  
6               certain members of the Class by paying their UIM or hit-and-run claims  
              under its collision or comprehensive coverage.

7 (Compl. ¶ 7.6.) Defendants contend that these mischaracterization claims should be  
8 dismissed because Ms. Fosmire does not allege that Defendants mischaracterized her own  
9 claim and thus does not have standing to assert such mischaracterization claims. Ms.  
10 Fosmire responds that Defendants' argument is premature. (Resp. at 8.) As she views it,  
11 the question is one of typicality under Federal Rule of Civil Procedure 23(a), which  
12 should be reserved for consideration as part of a motion for class certification. Ms.  
13 Fosmire argues she will be able to represent a class as to both the mischaracterization  
14 claims and the non-mischaracterization because all of the claims arise from the same  
15 alleged wrongful conduct. (*Id.* at 10.)

16       Standing in class actions is a threshold matter that "is satisfied if at least one  
17 named plaintiff meets the requirements." *Bates*, 511 F.3d at 985; *see Armstrong v. Davis*,  
18 275 F.3d 849, 860 (9th Cir. 2001). Courts in this district have expressed mixed views  
19 regarding whether to reserve inquiry into a named plaintiff's standing to bring a claim on  
20 behalf of other members of the proposed class where the named plaintiff has not suffered  
21 the injury that forms the basis of the claim. *Compare Martin*, 2009 WL 902072, at \*2  
22 (reserving question until class certification), *with Shin*, 2009 WL 688586, at \*4

(dismissing mischaracterization claims on motion to dismiss because named plaintiff did not have standing); *see also Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 555-56 (W.D. Wash. 2008). Though the issue may be appropriately reserved in some cases, the court finds that there is no reason to delay consideration of the issue here. Progressive Max did not mischaracterize Ms. Fosmire's insurance claim, and the misrepresentation claims in the complaint neither arise from the same conduct as Ms. Fosmire's own claims regarding diminished value loss nor involve the same legal theories. The *Shin* court, confronted with an analogous situation, concluded that a proposed class representative may not "assert a litany of claims against a defendant merely because the plaintiff has standing for one such claim." *Shin*, 2009 WL 688586, at \*4. Just as in *Shin*, so too here: Ms. Fosmire does not have standing to bring misrepresentation claims merely because she has standing to assert distinct breach of contract claims regarding diminished value loss. The court grants Defendants' motion to dismiss Ms. Fosmire's misrepresentation claims without prejudice.

## **B. Motion to Dismiss Counts II and III**

### **1. Rule 12(b)(6) Legal Standard**

When considering a motion to dismiss under Rule 12(b)(6), the court construes the complaint in the light most favorable to the non-moving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *Wylar Summit P'ship v. Turner Broad. Sys.*, 135 F.3d 658, 661 (9th Cir. 1998). "To survive a motion to dismiss, a complaint must contain sufficient factual matter,

accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Dismissal under Rule 12(b)(6) can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

## 2. Count II: Declaratory Judgment

Ms. Fosmire requests a declaratory judgment in Count II of her complaint. (Comp. ¶¶ 7.16-7.17.) Defendants move to dismiss this count on the basis that it seeks the same relief as that sought in Ms. Fosmire’s cause of action for breach of contract. (Mot. at 18-20.) To maintain a claim under the Declaratory Judgment Act, “a plaintiff must establish standing by showing ‘that there is a substantial controversy, between parties having adverse interest, of sufficient immediacy and reality to warrant issuance of a declaratory judgment.’” *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 658 (9th Cir. 2002); *see also Aydin Corp. v. Union of India*, 940 F.2d 527, 529 (9th Cir. 1991). Requests for declaratory judgment orders that merely impose the remedies provided for in other claims are duplicative and may be dismissed on that basis. *Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007) (adopting the opinion of *Swartz v. KPMG LLP*, 401 F. Supp. 2d 1146, 1154-55 (W.D. Wash. 2004)).

Here, the court finds that Count II is duplicative of Ms. Fosmire’s breach of contract claims and must be dismissed. *Hovenkotter*, 2009 WL 6698629, at \*6. Pursuant to Count II, Ms. Fosmire “seeks an order declaring that Defendants are obligated under the UIM policy provisions to notify policyholders of their diminished value losses, to

1 readjust Plaintiff's and Class Members' claims for diminished value loss, and to reverse  
2 all consequences of having paid hit-and-run claims under the collision or comprehensive  
3 provisions." (Resp. at 13.) In *Hovenkotter*, the court, confronted with an identical cause  
4 of action for declaratory relief, dismissed the claim as duplicative of the plaintiff's breach  
5 of contract claims. *Hovenkotter*, 2009 WL 6698629, at \*6. The same result is  
6 appropriate here. Resolution of Ms. Fosmire's other claims will already determine  
7 whether the remedies sought in her declaratory judgment claim should be imposed.  
8 Accordingly, the court dismisses Count II. *See id.*

9 **3. Count III: Injunction**

10 In Count III, Ms. Fosmire seeks an injunction. (Compl. ¶¶ 7.18-7.26.) Defendants  
11 move to dismiss this claim on the basis that an injunction is a remedy, not an independent  
12 cause of action, and that Count III improperly seeks monetary relief. (Mot. at 20.)  
13 Defendants acknowledge, however, that this court denied an analogous request in  
14 *Hovenkotter*. (*Id.* at 20 n.3.) The court declines to dismiss Count III. *See Hovenkotter*,  
15 2009 WL 6698629, at \*6-7; *Martin*, 2009 WL 902072, at \*2.

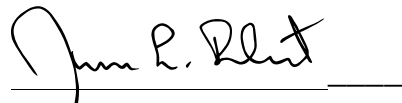
16 **C. Motion for Discovery**

17 In her response, Ms. Fosmire moves for leave to conduct pre-certification  
18 discovery to amend her complaint to add additional facts and/or to join additional  
19 plaintiffs. (Resp. at 10.) The court declines to resolve Ms. Fosmire's request in this  
20 order, but will issue a preliminary scheduling order in conjunction with this order. Ms.  
21 Fosmire may proceed in accordance with the preliminary scheduling order and may move  
22 to amend her complaint, if and when appropriate.

**III. CONCLUSION**

In light of the foregoing, the court GRANTS in part and DENIES in part the motion to dismiss (Dkt. # 34). The court DISMISSES Ms. Fosmire's claims against Progressive Casualty, Progressive Corporation, and Progressive Direct, and DISMISSES Count II.

Dated this 31st day of August, 2010.

A handwritten signature in black ink, appearing to read "James L. Robart", is written over a horizontal line.

JAMES L. ROBART  
United States District Judge